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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. ....

ABE ZEID, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Abe Zeid, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this case on August 2, 1960 affirming a judgment of conviction in the United States District Court for the Western District of Pennsylvania on two counts of an indictment charging petitioner with violating the Immigration and Nationality Act of 1952, Title 8 United States Code, Section 1302(a) and Title 8 United States Code, Section 1305. In support of his petition, pursuant to Rule 19 of this Honorable Court, your petitioner represents as follows:

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (McLaughlin, Staley and Hastie, circuit judges) entered on August 2, 1960 has not yet been printed and is appended hereto.

STATEMENT OF JURISDICTION

1. The judgment of the Court of Appeals sought to be reviewed was rendered and entered on August 2, 1960.

2. The jurisdiction of the Court is invoked under 28 U. S. C. A., Section 1254(1) and Rule 37(b) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court err in ruling that the United States sustained its burden of proving petitioner willfully failed to make application for alien registration and to be finger printed as required by Title 8, United States Code, Section 1302(a)?

2. Did the Circuit Court err in ruling that the United States sustained its burden of proving that petitioner had failed to file an address card with the Attorney General as required by Title 8, United States Code, Section 1305, where the sole evidence in support of the Government's case was the fact that no address card was found in its files?

3. Did the Circuit Court err in ruling that the trial Court did not abuse its discretion in reopening the case after the Government had rested and after defense counsel had moved for a directed verdict of acquittal where

there was no showing that the evidence that appellant had not been naturalized was unavailable to the Government prior to trial?

4. Did the Circuit Court err in ruling that the trial Court did not abuse its discretion in refusing to permit questioning by defense counsel, on voire dire, on the matter of the weight the prospective Jurors might give to testimony by employees of the United States?

5. Did the Circuit Court err in ruling that the certification of the examination of the record at the Port of New York relating to petitioner's entry into the United States was sufficient corroborating evidence of petitioner's admission where it appears that the certification was not made by the officer having legal custody of the original record and where the record was not an actual duplication of the manifest of the SS Finland?

6. Did the Circuit Court err in ruling that the admission of petitioner's testimony before a Federal Grand Jury did not violate his privilege against self incrimination where it does not appear that petitioner was warned that his response to the questions posed might incriminate him?

STATUTES INVOLVED

Title 8. Section 1302 (a), United States Code

"§ 1302. Registration of aliens

(a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or

longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."

Title 8, Section 1306(a), United States Code

"§ 1306. Penalties—Willful failure to register

(a) Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both."

Title 8, Section 1305, United States Code

"Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registration Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter, or on the first day of January of each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulations be required by the Attorney General. Any such alien shall likewise notify the Attorney General in writing of each change of address and new address within ten days from the date of such change. * * *"

Title 28, Section 1733, United States Code

"§ 1733. Government records and papers; copies

(a) Books or records of account of minutes of pro-

ceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

Rule 44, Federal Rules of Civil Procedure:

"Rule 44. Proof of Official Record

"(a) Authentication of Copy. An official record or any entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. . . ."

"(b) Proof of Lack of Record. A written statement, signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry."

Rule 27, Federal Rules of Civil Procedure

"An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions."

STATEMENT OF THE CASE

Petitioner was indicted and convicted, upon a jury's verdict, for

(1) willfully failing to make application for alien registration and to be finger printed in violation of Title 8 United States Code, Section 1302(a)

and for

(2) failure to notify the Attorney General of his current address in violation of Title 8 United States Code Section 1305.

Petitioner was sentenced to serve a term of imprisonment for five months and to pay a fine of $1,000.00 for violation of Count I and was sentenced to serve a term of imprisonment of thirty days and to pay a fine of $200.00 for violation of Count II of the indictment, prison sentences to run concurrently (152a). The appeal to the United States Court of Appeals for the Third Circuit arose from the denial of Petitioner's motions for judgment of acquittal as to both counts in the indictment made at the close of the government's case (107a-108a) and at the close of all the testimony (113a), and from errors in the admission of evidence over the objections of defense counsel.

On October 27, 1958, petitioner testified before a Federal grand jury in Pittsburgh (52a-53a) in connection with another case. The government was not seeking prosecution of petitioner at the time (57a). Following petitioner's testimony as to the subject then under investigation, was asked, questions relating to his own citizenship and he responded with clear admissions that he had never become a citizen of the United States, that

he realized in 1950 that he was not a citizen, and that he never made any attempt to become one (59a). There is no evidence that petitioner was warned that his testimony might tend to incriminate him.

Immediately following his appearance before the grand jury, petitioner submitted himself for registration as an alien at the Pittsburgh office of the Immigration and Naturalization Service (37a) and on the following day made a sworn statement relevant to the instant prosecution (45a). Prior to these events, there had been no investigation of petitioner for failure to comply with the statute in issue (45a). A true bill was returned against him on June 5, 1959 and the indictment was filed on that day (1a); trial commenced on January 4, 1960 and was concluded on January 6, 1960.

At the outset of the trial and in chambers, a discussion was held relative to the propriety of certain questions defense counsel chose to ask on voir dire juror examination. The questions which counsel desired to ask related to the weight the prospective jurors might give to testimony by employees of the United States simply by virtue of the fact that such employees possessed official capacity. Counsel was refused permission to pursue this line of inquiry (8a, 9a).

The government's evidence consisted of petitioner's own admissions to the Immigration and Naturalization officer (40a-52a) and to the grand jury (59a) plus a purported copy of the manifest of the SS Finland (34a) along with various other records for the purpose of proving that petitioner was born at Brest Litovsk, Russia on July 30, 1907 and entered the United States on March 27, 1913 at Ellis Island, New York on the SS Finland.

The government records showed an absence of any alien registration by him (Exhibit No. 1, 34a); the absence of any evidence that an address card had been filed for the year in question (Exhibit No. 2, 34a), and the absence of any record of naturalization for petitioner, his father or his mother (Exhibits 8, 9 and 10, 105a-107a). Proof of lack of any naturalization records was permitted after the government had rested and after petitioner had moved for a directed verdict of acquittal. In addition, it was established, along with certain conflicting statements by petitioner in which he expressed doubt as to his nationality, that on December 23, 1954 he made application for marriage in the Orphans' Court of Westmoreland County, Pennsylvania and listed his birthplace as New York City, New York (72a-73a).

Further, petitioner at one time, went to the Immigration and Naturalization Office at Miami Beach, Florida, to register as an alien and was referred to the Pittsburgh, Pennsylvania branch at that office, but petitioner, in fact, made no further effort to register as an alien until after he had testified before the Grand Jury.

REASONS IN SUPPORT OF THE GRANTING OF THE WRIT

I. Both the District Court and the United States Court of Appeals for the Third Circuit committed error in concluding that there was sufficient evidence from which the issue of willfulness could be submitted to the jury as that term has been defined by this Court.

United States v. Murdock, 290 U. S. 389 (1933) was a prosecution for a willful failure to supply information to the government under the Revenue Act of 1926, Section 1114(a) and the Act of 1928, Section 146(a). Appellant had refused to give the information in question for fear of prosecution under state law, and the Court concluded, in reviewing the charge of the Court and determining the propriety of certain instructions to the jury, that even if appellant had no right to refuse to give the information because his refusal was intentional and without legal justification, the jury might still appropriately find that appellant's conduct was not prompted by bad faith or evil intent which the statute had made an element of the offense in issue.

This Court in *Murdock* emphasized the following attributes of "willful" at page 394:

> "The word often denotes an act which is intentional, or knowing or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose . . . without justifiable excuse . . . stubbornly, obstinately, perversely . . . The word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act . . ."

Even more significant, at page 395:

> "This court has held that where directions as to the method of conducting a business are embodied in a revenue act to prevent loss of taxes, and the act declares a willful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime."

Section 1114(a) of the Revenue Act of 1926, the statute involved in *Murdock*, read as follows:

> "Any person required under the Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purpose of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . ."

Subsequent statues, Section 145(a) under the 1939 Internal Revenue Code, and Title 26, USCA, Section 7203 under the 1954 Internal Revenue Code, are identical in legislative intent and purpose.

The United States Court of Appeals for the Third Circuit recently had occasion to construe Section 145(a) of the Internal Revenue Code of 1939 in *United States v. Palermo*, 259 F. 2d 872 (3rd Cir. 1958) which resulted in a reversal of defendant's conviction for the trial Court's failure to give proper emphasis to the aspect of the definition of willfulness in *Murdock, supra*, requiring a finding of evil motive or bad purpose. The *Palermo*

conviction was for a willful failure to pay a tax as evidenced by a series of defaults and defendant's numerous expenditures for "luxury" items at the time he was indebted to the government, all of which, in the mind of the trial judge, indicated that defendant had conducted himself "stubbornly, obstinately and perversely" as defined in the *Murdock* case, *supra*. That court ruled to the contrary, concluding that it was the government's burden to prove a specific wrongful intent, for, at page 882:

> "Willfulness is an essential element of the crime proscribed by Section 145(a). It requres existence of a specific wrongful intent—an evil motive—at the time the crime charged was committed: *viz.*, failure to pay the tax due at the time required by law. A series of defaults, indicating a pattern of behavior, knowingly and intentionally made, may suggest the existence of the specific 'evil motive'. Mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by 'evil motive' are not probative of 'willfulness'."

Assuming that there was sufficient corroboration of petitioner's own admissions, there is nothing in the evidence of this case from which reasonable minds could conclude that appellant's failure to register was willful—that he had any evil motive in his failure to comply with the statute. The jury believed the following evidence. Petitioner was born at Brest Litovsk, Russia and entered the United States on the SS Finland at Ellis Island, New York in March, 1913 when he was approximately six or seven years of age (29a, 31a, 40a). Petitioner, as far back as 1924 knew he was born in Russia ((44a), but on several occasions he had expressed doubt about his nationality, stating that up until 1947 he believed he had

been born in New York (41a), or that he had become a citizen through his father's naturalization (42a). Approximately four months prior to October, 1958, he had made inquiry about registering as an alien at the Miami, Florida Immigration office and had been referred to Pittsburgh for that purpose (48a). Petitioner made application for marriage in the Orphans' Court of Westmoreland County, Pennsylvania on December 23, 1954 and listed his birthplace as New York City, New York (72a, 73a). Petitioner apparently appeared voluntarily and submitted himself for registration as an alien on October 27, 1958 at Pittsburgh (37a). By the jury's verdict, he stands convicted of both counts of the indictment (147a).

Call it laxity, careless disregard of the duty to register or even gross negligence, nothing in this record gives rise to a conclusion that petitioner's failure was attended by any bad purpose or evil motive. The apparent misstatement on the application for marriage could have been out of desire to conceal foreign birth from his intended wife, but in any event, it cannot be inferred that the mis-statement, if it was one, carried with it any specific criminal intention to violate the law in issue. In fact, petitioner's subsequent inquiry to the Miami office refutes such an inference. From every indication on this record, petitioner submitted himself voluntarily for the purpose of registering as an alien. It is respectfully submitted that the evidence was not sufficient to submit the question of willfulness to the jury in view of this Court's interpretation of the term "willfulness". The record is void of any showing of bad faith or evil motive as required by this Court.

II. The decision herein sustaining the conviction of petitioner on Count II of the indictment charging him with failure to file an address card in violation of Title 8 U. S. C. A. Section 1305 departs from the accepted and usual course of judicial proceedings in that the petitioner was held to answer for a crime based on negative evidence. The necessary quantum of proof required to sustain a conviction for violation of Title 8 United States Code, Section 1305 has not been, but should be, settled by this Court.

The Second Count of the indictment (5a) charges, in essence, that petitioner failed to file an address card with the office of the Attorney General on or about February 2, 1958 in violation of Title 8 USCA, Section 1305. The sole evidence in support of this Count was government Exhibit No. 2, a certification by an associate commissioner of the Immigration and Naturalization Service that a search had been made of their records and that no evidence of an annual address report appears for the year 1958 for the petitioner (34a, 112a). Cross examination of George P. Spine, investigator with the Immigration and Naturalization Service, and principal witness for the government, revealed that these alien address cards are filed with any postmaster who in turn forwards them to the appropriate Immigration Control Office where they are retained for one year (46a).

The quantum of proof necessary to sustain a conviction on Count Two of this indictment has already been determined in *United States v. Ginn*, 222 F. 2d 289 (3rd Cir. 1955) where the judgment of conviction was reversed on an indictment charging, in part, failure to file

alien address cards. Judge Goodrich's opinion reads as follows at page 291:

> "The turning in of such a card to a clerk at a post office window, its assembly with other cards of a similar nature, the packaging and forwarding to Washington, the arrangement of a card in a file, possible withdrawal for purpose of consultation by some government employee of cards in particular file drawers—all provide too many chances of error, loss or misplacement to prove a criminal case by the simple absence of the cards from a file. We might add that it was not even proved that the cards were not in the file. The most the affidavit says is that the custodian looked and did not find them."

The proof in this case is no more convincing than that in *Ginn*.

III. The Court abused its discretion in reopening the case after the government had rested, and after defense counsel had moved for directed verdict of acquittal, where there was no showing that the proof of petitioner's non-naturalization was unavailable to the government prior to trial. In sustaining this action by the trial Court, the Circuit Court departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioner was indicted on the Counts in issue (4a, 5a) on June 5, 1959 (1a); he had appeared before a Federal Grand Jury on October 27, 1958 (53a) and before Investigator Spine with the Immigration and Naturalization Service on October 28, 1958 (35a) and on both occasions gave damaging statements relevant to the indict-

ment in issue. It was on the basis of his statement to Mr. Spine that the investigation of this petitioner was commenced. Trial began on January 4, 1960 (2a). The government rested its case (79a) without proving the negative proposition that petitioner had not been naturalized; its evidence, to that point, showed, if anything, that petitioner had not registered as an alien (85a). Defense counsel moved for a directed verdict of acquittal (79a) for the reason, among others, that the government had failed to prove that petitioner had not been naturalized. The government requested permission to reopen the case to establish this fact (87a) and the Court granted the motion over "a most vigorous exception." (88a). The following day Government Exhibits Nos. 8, 9 and 10 certifying the non-existence of any records of naturalization for petitioner, his father or mother were introduced into evidence over petitioner's objection that the government had already rested (105a-107a). The government then rested (107a).

The United States Court of Appeals for the Third Circuit has previously ruled on the discretion which the trial judge has in this particular situation in *United States v. Maggio*, 126 F. 2d 155, 158 (3rd Cir. 1942):

> "We see no basis for holding that the trial judge abused his discretion in permitting the testimony of Bematre to be offered out of order. On the contrary the fact that that testimony was not available to the government until a few minutes before it was offered makes it clear that the court's action was quite proper . . . It is unnecessary for us to consider the academic question whether at the time the government originally rested its case the defendants' motion for directed verdict should have been granted.

> The trial of a criminal case is not a game in which a guilty defendant is entitled to go free, merely because, at an intermediate stage of the proceedings the government through no fault of its own has not been able to offer evidence, later procured and offered, which establishes the defendants' guilt.'"

It may be reasonably inferred that the evidence for which the case was reopened was available to the government from the outset of its investigation; the files of the Records Administration and Information Branch, Administrative Division of the Central Office, Immigration and Naturalization Service were always available to the government for the purpose of proving the absence of any naturalization record in issue. There is no proof that the evidence was not available to the government long before it was offered, and it is respectfully submitted that the Court abused its discretion in reopening the case and, in effect, overruling petitioner's motion for directed verdict of acquittal. The motion should have been granted for the government's failure to prove an essential element of its case, the fact that petitioner had not been naturalized

IV. In refusing to permit petitioner's counsel to question prospective jurors on voir dire on the matter of the weight the prospective jurors might give to testimony by employees of the United States, the lower Courts are at variance and in conflict with the decisions rendered in other Circuits.

Request to ask the following questions of the jury panel was denied (8a, 9a):

> *Mr. Carliner*: "The first question that I have already discussed, your Honor; I would like to ask the question whether any member of the jury panel is more likely to believe a witness who is employed by the United States Government than a witness who is not employed by the government."
>
> *Mr. Carliner*: "The third question that I would like to have asked of the jury, your Honor, is whether any member of the jury panel is employed or has ever been employed in an investigative capacity for any private employer as a detective or an investigator for insurance companies, banks, private detective agencies, organizations of that kind . . . . My reason for it, I think is quite plain, your Honor, I think a person who works as an investigator has a type of mind that would condition him to believing a prosecution witness rather than a defense. I may be wrong, but I think that is a factor."

Implicit in this line of questioning is the thought that a prospective juror might give undue weight to the testimony of a government witness due to the fact that he was employed in an official capacity. It s respectfully submitted that the line of inquiry which was blocked was a proper one.

The Court had broad discretion in selecting the questions to be put to the jury on *voir dire,* but "the exercise of this discertion, and the restriction upon inquiries at the request of counsel, were subject to the essential demands of fairness," *Aldridge v. United States,* 283 U. S. 308, 310 (1931). The precise question presented by the above quoted requests of counsel was presented in *Chaves.v. United States,* 258 F. 2d 816 (10th Cir. 1958), a prosecution for the unlawful receipt, concealment and aid in transporting heroin. The testimony of narcotics agents was obviously involved, and the court held as follows at page 819:

> "When it is anticipated that law enforcement officers may testify in a cause it is a proper subject of *voir dire* juror examination to inquire relative to the attitude of prospective jurors toward law enforcement officers. But the inquiry should be directed to the question of whether the prospective juror would give greater or less weight to the testimony of a law enforcement officer than to that of another witness *simply because of his official character.* A defendant cannot be fairly tried by a juror who would be inclined to give unqualified credence to a law enforcement officer *simply because he is an officer.* But the question propounded by these appellants did not so inquire but rather attempted to improperly search the juror as to whether he would believe a law enforcement officer over the defendants. The question has no proper probative effect unless qualified as we emphasize. Jurors have a right and duty to determine credibility and to believe, in a particular case, the testimony of a law enforcement officer over that of a defendant. They did just that in the instant

case. A *voir dire* examination cannot search the result of the case in advance."

On the basis of the *Chavez* case, *supra,* The United States Court of Appeals for the District of Columbia Circuit granted a new trial in *Sellers v. United States,* 271 F. 2d 475 (D. C. Cir. 1959), also a narcotics case, because of the trial Court's refusal to permit the following question to be put to the jury panel: whether " 'any of the jurors (are) inclined to give more weight to the testimony of a police officer *merely because he is a police officer* than any other witness in the case?" (Emphasis supplied.)"

V. The Circuit Court committed error in ruling that the certification of the abstract of the manifest was a properly authenticated government record, since the certification was not made by the officer who had lawful custody of the original record, and since it was not the actual copy of the manifest of the ship of entry. In so ruling, the decision of the lower Court is at variance and in conflict with the decisions rendered in other Circuits.

Petitioner's birthplace and birthdate and date of entry into the United States were not proved by substantial evidence apart from his statement. The record of the Boys Industrial School, Lancaster, Ohio does not, with accuracy, indicate the source of the information pertaining to petitioner's birthplace, and, as such, constituted hearsay evidence (64a). The record of the Jewish Family Service of Cleveland, Ohio is subject to the same objection (66a, 71a-72a). The government sought to fill this gap by proof obtained at the time petitioner en-

tered the United States, evidenced by the manifest of the SS Finland.

The record at the Port of New York was admitted into evidence, over objection (32a), to prove petitioner's birthplace, birthdate and that he entered the United States on March 27, 1913 on the SS Finland. The certification was made by the District Director of the New York District of the Immigration and Naturalization Service to the effect that a search had been made of the records at the Port of New York which revealed the information in question (Exhibit No. 3, 34a). The certification was not made by the officer who had legal custody of the original records.

The purpose in admitting government records in the manner prescribed is to obviate the need for direct testimony of the person or persons familiar with the compiling of the record as well as to limit the delay and expense of obtaining witnesses from great distances to testify. Under these circumstances, however, it is imperative that the record be certified to by the officer having legal custody of the original record to minimize serious error. This requirement was strictly adhered to in *Mullican v. United States*, 252 F. 2d 398 (5th Cir. 1958), involving an indictment under the Federal Escape Act.

In the instant case, it is obvious that the proper person to certify the existence of the manifest of the SS Finland was the officer in charge at the Port of New York where legal custody of the original manifest was maintained. The record in question was objectionable, therefore, because not authenticated by the person who had legal custody thereof.

But even more significant is the fact that the authentication in issue is not a "copy" of the original as required by the rules. By the prosecuting attorney's own statement at side bar, the information in the certification was taken from the manifest—it was not a copy of the manifest (28a); it is a document prepared for use in the case at bar (29a). Assuming that petitioner was born at Brest Litovsk, Russia, then the information on the certification is clearly inaccurate because it describes the city of birth as "Breskit" (29a)—an error in copying or a different city, but in no event a true copy of the ship's manifest in question. Furthermore there is an inaccuracy insofar as petitioner's age is concerned—a correct age at time of entry would have been six and not seven if in fact the date of entry was correct (29a). The exhibit in question, at best, is an abstract of what appears in the original manifest—it is not a copy or duplication of the manifest itself. In the absence of direct testimony of what the manifest says, certainly the proof required must be its equivalent—an exact copy.

VI. The issue of the admissibility of petitioner's testimony before a Federal Grand Jury embodies an important question of Federal law which has not been, but should be, settled by this Court, inasmuch as there is no ruling governing the right of a witness before a Grand Jury to be warned of the privilege against self-incrimination.

On October 27, 1959, petitioner was called before a Federal grand jury in Pittsburgh (52a, 53a) to testify in connection with another case. The government was not seeking prosecution of this petitioner at the time (57a). It does not appear directly that petitioner appeared by process of subpoena, but it can be presumed such was the case, especially where defense counsel asserted that petitioner was a witness "under compulsion of a subpoena" (56a), and this assertion was not denied by the government. But whether petitioner was there voluntarily or otherwise is of no real consequence to the issue here. At the end of petitioner's testimony relating to the subject then under investigation, he was asked questions relating to his own citizenship and he responded with clear admissions that he had never become a citizen of the United States, that he realized in 1950 that he was not a citizen, and that he never made any attempt since that time to become a citizen (59a). This testimony was introduced, over objection, despite the fact there is no indication that petitioner was ever warned that his testimony might tend to incriminate him (56a, 57a). The testimony was obviously incriminating and, as trial counsel put it, had a "killing" effect (55a).

While the "witness" before the grand jury was not a defendant, it is equally true that he might as well have

been. The use of his testimony produced the identical damaging result had he in fact been under investigation for the charges for which he now stands convicted and chose to waive his privilege, after being cautioned, and voluntarily testified against himself. It is time that the distinction made between the rights of a defendant and those of a witness before the grand jury be eradicated.

Early cases have dealt with this issue in a slightly different context wherein the indictments themselves were attacked because obtained on the basis of defendants' own testimony before the grand juries which indicted them. In *United States v. Edgerton*, 80 F. 374 (D. C. D. Montana 1897), the court ruled at page 375:

> "It is fatal to the indictments that the defendant was called to testify in the particular matter from which they resulted, without being informed or knowing that his own conduct was the subject under investigation."

Later, in *United States v. Kimball*, 117 F. 156, 166 (Circuit Court, S. D. N. Y. 1902), the court had before it the same question but it affirmatively appeared that defendant had been advised by counsel of his rights and had been warned of the possible consequences of his testimony. The court distinguished the *Edgerton* case, *supra*, at page 167:

> "In the Edgerton case it is inferable that the witness had no knowledge, nor was he warned, that the investigation related to him."

In *United States v. Wetmore*, 218 F. 227 (D. C. W. D. Pa. 1914) the court had before it indictments for fraud procured on defendants' own testimony before the grand

jury which subsequently indicted them. This interesting observation appears at page 233:

> "These men, and none of the other witnesses, as far as appears, were not notified by the district attorney that they were the subject of inquiry in the investigation then proceeding. It is not alleged, nor does it in any manner appear, that the said defendants, or any of them, claimed any immunity or privilege from testifying as witnesses, that they made any objection to being sworn or testifying, *nor is it shown that the testimony elicited from them tended to incriminate them.*" (Emphasis supplied.)

Most recently in *United States v. Scully*, 225 F. 2d 113 (2d Cir. 1955) the court concluded that a contemplated defendant need not be warned of any privilege he might have to remain silent before the grand jury.

Subsequent rulings in the Second Circuit leave some doubt as to the conclusiveness of the *Scully* decision, *supra*. In *United States v. Mary Lee Garnes*, 258 F. 2d 530 (2d Cir. 1958), defendant who was subsequently indicted for violation of the narcotics laws, testified before a grand jury after being warned of her privilege to remain silent and after being given the chance to consult with counsel. At page 534 the court stated: "This was more than adequate protection of her rights." And in *United States v. Klein*, 247 F. 2d 908 (2d Cir. 1957), defendant was warned by the prosecuting attorney that he was subject to possible indictment on the basis of testimony he might give before a grand jury. If the ruling of the court in *Scully* is correct, then subsequent prosecutions have accorded more fair play than the law requires. It is more reasonable to infer that

following the *Scully* decision, prosecutors have realized that fair law enforcement requires that a witness be warned of his privilege.

In the instant case, the questions posed to petitioner when he testified before the grand jury were innocuous enough, at first blush—especially to a layman unfamiliar with the registration statute in question. There was nothing in the questions themselves which would place petitioner on notice that he had better think twice before answering as would have been the case if he had been asked point blank: "Have you registered as an alien as required by law?" The innocent form of the questions coupled with the fact that appellant himself was obviously not under investigation caught him totally unaware of the fatal consequences of his testimony. Moreover, having testified under subpoena to the matter then under investigation, appellant could not be presumed to know that when the questioning switched to matters of his own personal identification that he should, at that point, stop giving information. The prosecutor had every reason to believe that the answers to these precise questions might very well tend to incriminate petitioner, otherwise there was no reason for asking them as he did. If the United States Attorney simply wanted identification, petitioner's name, occupation and address would have served that purpose.

Conclusion.

Wherefore, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Court of Appeals had in this cause, to the end that the cause may be reviewed and determined by this Court; that the judgment of the said Court of Appeals be reversed; and that the petitioner may be granted such other, further and different relief as may seem proper.

ABE ZEID
Petitioner, Pro Se

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,160

UNITED STATES OF AMERICA,
v.
ABE ZEID, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 23, 1960
Before MCLAUGHLIN, STALEY and HASTIE, Circuit Judges.

Opinion of the Court.
(Filed August 2, 1960)

By MCLAUGHLIN, Circuit Judge.

Appellant was convicted of (1) wilfully failing to make application for registration as an alien under the Immigration and Nationality Act of 1952, 8 U.S.C. § 1302 (a) and (2) of failing to give written notice to the Attorney General of his current address in accordance with the same Act, 8 U.S.C. § 1305. He was sentenced to be imprisoned for five months and fined $1,000 on the first count. On the second count he was sentenced to be imprisoned for thirty days (to run concurrently with the sentence given on the first count) and to pay $200 fine.

Seven points are urged for reversal. The first of these, one of the two main points argued, is that as a matter of law, the record is void of evidence from which the jury could reasonably conclude appellant had wilfully failed to make application for alien registration and to be fingerprinted.[1]

The trial disclosed that examination of the Immigration and Naturalization Service files had developed nothing to indicate appellant had ever registered as an alien. Appellant did not take the stand nor was there any evidence offered in his behalf. Similarly, examination of the Service files evidenced no annual address report for 1958 as to appellant.[2] The files of the Service did show the date of appellant's entry into this country as March 27, 1913, which was in no way contradicted.

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1. The applicable statute, 8 U.S.C. § 1302(a), reads:

"It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."

2. Section 1305 in pertinent part reads:

"Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registation Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter, or on the first day of January of each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulation be required by the Attorney General. Any such alien shall likewise notify the Attorney General in writing of each change of address and new address within ten days from the date of such change. * * *"

Wilfulness, by the language of Section 1302(a), is an indispensable element of the offense under the first count and the trial judge so charged. The government recognized its burden in this connection and submitted evidence, set out below, of Zeid's course of conduct which by a hard count demonstrated that he was fully aware he was an alien required to register and be fingerprinted but purposely and wrongfully refused to do so.

On October 27, 1958, appellant was subpoenaed as a witness to testify before a grand jury in Pittsburgh, Pennsylvania. He was not a defendant in the matter, no prosecution of him was being sought and nothing in that particular inquiry as far as he is concerned has ever come before a grand jury. In the course of his examination as such witness he was asked by a juror, "Why have you never become a citizen of the United States?" Appellant answered, "Well, I was under the assumption that my father was a citizen due to the fact he was over in this country *before I was born, and I never realized until about 1950 that I wasn't a citizen.*" A juror then asked, "*Have you ever tried to become one since 1950?*" Appellant answered, "*No, I haven't.*" (Emphasis supplied).

That same day, October 27, 1958, following his grand jury appearance, he went to the Pittsburgh office of the Immigration Service and registered as an alien. The following day appellant talked with George P. Spine, an Immigration and Naturalization Service investigator, at the Service office in the Pittsburgh Federal Building. Spine testified about this as follows: "I asked him why he had not registered as an alien under the Alien Registration Act of 1940. At first he stated he thought he was

a citizen through his father; later on he stated he believed he was born in New York until about 1947, when he assumed that he may have been a citizen through his father, whom he believed was naturalized, although he never had any verification of his father's naturalization. He further stated that about four months previous to the time I first interrogated him, he had ascertained from a brother Milton I believe, that he was not a citizen, either through his father nor by birth in the United States." Spine also said: "He stated that when his brother informed him that he was not a citizen, which was four months before I talked to him, why, he had gone to the Miami Immigration office and they referred him to Pittsburgh, but he had returned to the Pittsburgh area two months before I talked to him, and had not come to the Immigration office." Spine was asked, "Did you ask him why he had not come to the Immigration office?" He answered: "He said he was sick. I asked him, he said he had been sick." Spine stated that he had no reason to disbelieve appellant when the latter stated he was referred to the Pittsburgh office.

Spine saw appellant again on January 26, 1959. At that time, as Spine testified and was not denied, "He stated that he knew he was born in Russia in 1924, *that is, he knew as far back as 1924 that he was born in Russia.*" (Emphasis supplied).

The Director of Treatment Resources, Boys Industrial School, Lancaster, Ohio, was a witness at the trial. He had with him the records of the school as called for by his subpoena duces tecum. Appellant's attorney stipulated that the School records showed that the place of birth of appellant was Russia, his date of birth, July 30,

1907 and that he was admitted to the School August 26, 1924, at which time he was seventeen years old.

An assistant clerk from the Orphans Court of Westmoreland County, Pennsylvania was a witness. He produced under subpoena the original application of appellant and Norma Tallarico for a marriage license *made on December 23, 1954 and signed by appellant. This gives his birthplace as New York City, New York.* Cross-examination developed that each applicant answers his or her own questions.

A certification of the master fingerprint card of appellant on file with the Federal Bureau of Investigation was in evidence. The master card is signed by appellant and gives his date of birth and his birthplace as Russia. The card dates are from September 8, 1930 to July 15, 1936. This was accepted into evidence strictly for the purpose of showing appellant had stated on the first date noted on the card or within the dates named, that his birthplace was Russia.

Finally, on this phase, there was in evidence the appellant's family record of the Jewish Family Service of Cleveland, Ohio. This noted that appellant was born 7-15-07 at Brest-Litovsk, Russia. The application for assistance was made to the service by the mother. The record itself does not state who supplied the above information re appellant.

In the face of the outlined evidence it cannot be reasonably concluded that the jury did not have before it substantial proof for the government's contention that appellant's failure to register and be fingerprinted under 8 U.S.C. § 1302 (a) had been wilful. The whole theory of the defense is that there is nothing in the government's

case to furnish any support to the necessary element that Zeid intentionally did not register as he was commanded to do by the statute. But appellant's own story, pieced together from what he told Spine and the various exhibits, is self-destroying as far as any alleged lack of intent not to register and be fingerprinted is concerned. For example, regarding his application for a marriage license made December 23, 1954. He there said his birthplace was New York City, New York. At that time under various admissions by him in evidence, he knew this was false. He knew he had been born in Russia. In the face of this deliberate falsehood the argument to us is that "The *apparent* misstatement * * * could have been made out of a desire to conceal foreign birth from his intended wife * * *." (Emphasis supplied). No evidence was produced by the defense to even bolster up that proposition.

From the above the following facts are before us. Appellant told Spine in 1958 that he had known since 1950 he was not a citizen and that four months prior to talking with Spine he knew from his brother that he was not a citizen either through his father or by birth in this country. At that time, as he said, he went to the Miami Immigration office to register as an alien and was referred to the Pittsburgh branch. He did nothing further for two months. Returning to Pittsburgh he did nothing for two more months and until after he had told the Grand Jury he was not a citizen when he went immediately to the Pittsburgh Immigration office and registered as an alien. The registration in the Lancaster Industrial School, the Cleveland Family Service data, the Federal Bureau of Investigation record, leave no doubt that appellant was born in Russia.

The evidence taken together does not reasonably shape up as mere thoughtless misstatements but rather gives the forceful impression that appellant had known for many years his birthplace was Russia; that at least from 1950 he realized he was not an American citizen; that four months before he went to the Pittsburgh Immigration office he knew he was obliged to register and despite this he did not register until after he had revealed to the Grand Jury that he was an alien.

The trial court, as has been stated, left to the jury the resolving of the query whether defendant's conduct was wilful. There is not now nor could there have been valid objection to the court's instruction on this branch of the charge. The jury found the defendant guilty under the first count from substantial evidence properly before it.

The second point asserts that the proof did not establish that appellant had violated 8 U.S.C. §1305 which requires an alient to file an address card.

The government's initial proof of this offense was, as it had to be, the certification by the person in charge of the Immigration and Naturalization Service records that a search had been made of those records and that there was no evidence of an annual address report of appellant for the year 1958. Under our opinion in United States v. Ginn, 222 F.2d 289 (3 Cir. 1955), that proof standing alone would not be sufficient to sustain a conviction. It is well to note that the district court was entirely familiar with the Ginn opinion and charged the jury that "The failure of the Immigration and Naturalization Service to find in their files an address card for the defendant for January 1958 is not without more suffi-

cient evidence from which to conclude beyond a reasonable doubt that the defendant did not file such a card." The vital distinction between this appeal and Ginn is that, in the latter the defendant testified that he had filed an address card whereas Zeid never contended to the investigator for the Immigration Service or thereafter that he had filed the statutory card. On the contrary he endeavored to explain why he had not registered as an alien. He said at first he thought he was a citizen through his father, then that he believed he had been born in New York because of which he assumed he may have been a citizen through his father, whom he believed was naturalized and that four months prior to Spine interviewing him, he had learned through his brother "that he was not a citizen, either through his father nor by birth in the United States." In this sequence it is important to remember that the necessity of notifying the Attorney General in writing of one's current address under Section 1305 applies solely to aliens required to be registered under Subchapter II, Immigration, 8 U.S.C. § 1281, et seq. or who were required, as Zeid had been, to be registered under the Alien Registration Act of 1940, as amended. In other words there was no reason for Zeid notifying the Attorney General of his current address if he was not compelled to register as an alien. If Zeid believed himself a citizen he might have had some excuse for not notifying the Attorney General. However, by 1950, as he advised Spine he realized he was not. Four months before registering, from what Spine testifies he said, Zeid was conscious of his obligation to do so but there is no inference from his story, as Spine told it, that he ever made claim of having sent notice of his address to the Attorney General during that or any

other time. Nor was there evidence presented on Zeid's behalf in contradiction of the above.

We are satisfied that the government adequately established its case against Zeid on the second count of the indictment, that it was rightly submitted to the jury and that the court's instruction in connection with it was sound under the Ginn opinion.

The remaining points can be disposed of briefly.

The court was within its discretion in permitting the government to reopen its case. United States v. Montgomery, 126 F.2d 151, 153 (3 Cir. 1942); Hoffman v. United States, 68 F.2d 101, 103 (10 Cir. 1933). Our United States v. Maggio, 126 F.2d 158 3 Cir. 1942) is not in conflict with these decisions or with the ruling of the trial court before us.

The district judge did not commit error in refusing to permit the two questions by the defense to the jury on voir dire in the form they were propounded. There was at the very least no clear abuse of discretion in the refusal. Butler v. United States, 191 F.2d 433, 435 (4 Cir. 1951).

We think the competency of government exhibit #3 was sufficiently established so as to justify the district judge in admitting it in evidence. Objection is made to the master fingerprint record because it indicated that Zeid had been arrested and charged with assault and battery. The theory is that this prevented a fair trial. The record was offered to help establish defendant's birthplace as Russia. The note about the arrest was on the card. Therefore part of the information on the card did incidentally mention an arrest, not a conviction, for

a minor offense. It was eliminated from the consideration of the jury in clear-cut fashion by the court. The problem was satisfactorily handled; there was no error. United States v. Stirone, 262 F.2d 571, 576 (3 Cir. 1959), rev. on other ground, 361 U.S. 212 (1960); Bram v. United States, 226 F.2d 858, 863 (8 Cir. 1955).

Appellant's last point is that the admission in evidence of his Grand Jury testimony violated his privilege against self-incrimination because he was not warned that what he said might be used against him.

There is nothing in the record to bear out the assertion that Zeid was not so warned. But assuming he was not, the cases cited by appellant in support of this thesis are not applicable because they involve testimony of defendants or possible defendants (who later became defendants) to indictments arising out of the matters as to which they had been interrogated. What is expressly asked for on behalf of appellant is that the distinction before a grand jury between defendants and witnesses be abolished.

In this instance, as we have already narrated, Zeid's appearance before the Grand Jury had to do solely with an inquiry by that body which was not directed at Zeid and from which nothing ever arose involving him. The Grand Jury never dealt with him as a possible defendant and was in nowise investigating him. He was a witness and nothing more. In answering a question by a juror, utterly unrelated to the business before the Grand Jury, Zeid did blurt out the above mentioned information and this may have so bothered him that he went to the Immigration office the same day and registered. But, with no fraud or duress implied as having been used against

Zeid, there was no obligation on the part of the District Attorney to warn him of his constitutional privilege or the dangers of self-incrimination. United States v. Miller, 80 F.Supp. 979, 981 (D.C.E.D.Pa. 1948). Indeed the District Attorney did not ask the particular questions at all. If Zeid had felt that answering them tended to incriminate him he could have stated his privilege and refused to answer them. Stanley v. United States, 245 F.2d 427, 434 (6 Cir. 1957). See also United States v. Orta, 253 F.2d 312, 314 (7 Cir. 1958).

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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No. 423

In the Supreme Court of the United States

OCTOBER TERM, 1960

ABE ZEID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a trial by jury in the District Court for the Western District of Pennsylvania, petitioner was convicted of willfully failing to register as an alien and failing to submit a current address report for 1958 with the Immigration and Naturalization Service, in violation of 8 U.S.C. 1302 and 1305 (R. 4-5, 147). He was sentenced to imprisonment for five months on count one and 30 days on count two, the sentences to run concurrently. In addition, petitioner was fined $1,000 on the first count and $200 on the second count (R. 152). On August 2, 1960, the Court of Appeals affirmed the conviction (R. 185).

No motion for rehearing was filed in the Court of Appeals.[1] Since petitioner filed his petition and record in this Court on September 20, 1960, the 49th day after the judgment was entered in the Court of Appeals, his petition is out of time under Rule 22(2) of the Rules of this Court.

The instant case offers no occasion to waive the requirements of Rule 22(2) since there is no substance to petitioner's contentions. The claim (Pet. 9-14) that the evidence is insufficient to support the conviction was found by the Court of Appeals—after a thorough analysis of the evidence—to be without merit (R. 177-182). The trial court did not abuse its discretion in refusing to propound two of petitioner's questions to the jury on their *voir dire* examination, and in permitting the government to reopen its case for the purpose of offering additional evidence (R. 182-183). See *Chavez* v. *United States*, 258 F. 2d 816, 819 (C.A. 10), and *United States* v. *Montgomery*, 126 F. 2d 151, 153 (C.A. 3). Govern-

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[1] On August 24, 1960, the mandate of the Court of Appeals was filed with the Clerk of the District Court, and petitioner was subsequently ordered to surrender himself for execution of sentence. On August 31, petitioner moved the Court of Appeals for a recall and stay of mandate (R. 187-188, 189). On September 1, the Court of Appeals recalled its mandate and stayed its issuance until September 21, 1960. The order further provided that "(i)f on or before such date the Clerk of the Supreme Court of the United States certifies in accordance with rule 36(b) of this court that the appellant herein has filed a petition for a writ of certiorari in the above entitled action, then such mandate shall be further stayed in accordance with such Rule" (R. 190).

ment Exhibit 3, an official government form entitled "Certificate of Admission", was properly introduced into evidence at the trial. Information on the exhibit was obtained from the manifest of the SS Finland, and properly certified by the District Director of the Service in New York. See 28 U.S.C. 1733 (b) and 8 C.F.R. 103.7. Petitioner's final contention (Pet. 22-25)—that his admissions before a federal grand jury in October 1958 were improperly introduced into evidence because there was "no indication [in the record] that petitioner was ever warned that his testimony might tend to incriminate him"—was also considered by the court below and found to be without merit (R. 183-184). There was no occasion to warn the petitioner of his constitutional privilege since he appeared before the grand jury as a witness—not as a defendant or prospective defendant—on a totally unrelated matter. *Stanley* v. *United States*, 245 F. 2d 427, 434 (C.A. 6).

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

OCTOBER 1960.

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